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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962

No. [redacted] 137

GENERAL MOTORS CORPORATION,
Petitioner,
vs.
UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION
and
THE ALABAMA GREAT SOUTHERN RAILROAD
COMPANY, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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THE ALABAMA GREAT SOUTHERN RAILROAD
COMPANY, ET AL.,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Earl C. Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner respectfully petitions this Honorable Court for a Writ of Certiorari to review a judgment and opinion of the Court of Appeals for the Sixth Circuit

rendered in this cause on February 17, 1962, and in support of this petition respectfully shows:

I. SUMMARY STATEMENT OF THE MATTER INVOLVED

The said judgment of the Court of Appeals for the Sixth Circuit affirmed an order of the District Court of the United States for the Eastern District of Michigan, Southern Division, upholding certain orders of the Interstate Commerce Commission, relating to transportation rates, which orders are adverse to petitioner. The opinion of the Court of Appeals which supports its judgment is included in the certified record[1] along with the opinion of the District Court and the opinions of the Interstate Commerce Commission.[2]

The effect of the judgment of the Court of Appeals is to require the payment by petitioner of railroad transportation rates and charges other than those specified in the lawfully published tariffs of the rail carriers contrary to the requirements of Part I of the Interstate Commerce Act (Title 49 U.S. Code).

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[1] The certified record (referred to herein as Rec.) consists of all relevant evidence before the Commission as stated in the appendix to appellant's brief, the proceedings before the Court of Appeals, the petition for rehearing, the order denying said petition, and the certification of Carl W. Reuss, Clerk, Sixth Circuit Court of Appeals.

[2] There are two decisions by the Commission. The first by a three member division was favorable to petitioner. The second, on petition of the defending rail carriers, was adverse to petitioner by a vote of 6 to 4, one Commissioner not participating; a petition for reconsideration was denied by a similar vote. (Rec. pp. 6a, 14a and 28a.)

II. JURISDICTIONAL STATEMENT

The Court of Appeals, Sixth Circuit, entered its judgment in this matter on February 17, 1962 (299 F. 2d 233). A timely filed petition for rehearing was denied by said court March 31, 1962. It is believed that the jurisdiction of this court in the instant matter is found in section 1254 of Title 28 of the United States Code.

III. QUESTION PRESENTED

The question presented is whether or not there is a rational basis for the orders of the Interstate Commerce Commission challenged by petitioner. The determination of this question depends upon the application of established rules in railroad freight tariffs.

IV. STATUTORY REQUIREMENTS

Carriers by railroad must comply with the requirements of Part I of the Interstate Commerce Act (Title 49, U. S. Code, §1, *et seq.*) and the Interstate Commerce Commission is empowered to administer the provisions of the act (Title 49, U. S. Code, §§11 and 12). Section 6 of the act requires rail carriers to file with the Commission and to keep open for public inspection schedules of rates and charges for transportation services rendered. Paragraph 7 of section 6 requires that such carriers strictly conform to the provisions of said schedules; said paragraph reads in its essential part as follows:

> "No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this

part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; * * *."

Unreasonable practices affecting the application of freight tariffs are declared by the statute to be unlawful (Title 49, U. S. Code, §1(6)).

V. STATEMENT OF THE CASE

The judgment of the Court of Appeals affirms the decision of the District Court upholding certain orders of the Interstate Commerce Commission under which petitioner was required to pay freight charges in excess of those claimed to be applicable under the provisions of the rail carrier's published tariffs. The rail carriers were defendants in the proceeding before the Commission and intervening defendants in the matter before the courts below.[3]

Petitioner through its Frigidaire Division manufactures and ships household appliances from Moraine, Ohio to points throughout the United States. The shipments involve various types of household appliances and fall generally into two categories. In one category each household appliance is separately rated in the rail carrier's

[3] One Hundred Forty-seven rail carriers were named as defendants before the Commission.

tariffs, under what is known as an "exceptions rating". The second category involves appliances rated under the "exceptions" tariff and those rated under the so-called new classification tariff.[4] The shipment here involved is in the first category.

The pertinent facts are as follows:

A. *The Shipment*—

From Moraine, Ohio to Miami, Florida, November 10, 1953

Articles: Cooling Boxes or Refrigerators, Drying Machines, and Electric Stoves

Total weight 23,625 pounds (Rec. p. 17a);

B. *The Effective Rate Tariffs*—

1) Old class rates applicable only to shipments rated by exceptions ratings (that is, exceptions to the basic classification ratings). (Rec. pp. 40a, 42a.)

2) New class rates applicable only to all-rail domestic shipments subject to the basic classification ratings on and after May 30, 1952. (Rec. pp. 37a, 38a and 42a);

C. *Mixed Carload Rating*—Item 13980-A (Uniform Freight Classification)

Articles included in the item: Cooling boxes * * * refrigerators * * * electric cooking stoves * * * drying machines * * *

[4] On May 30, 1952, under orders of the Commission in dockets 28300 and 28310, rail carriers established a new uniform classification of property and new class rates to apply to shipments subject to the descriptions in the new classification.

Minimum weight requirement 18,000 pounds; Carload rating—Class 55 (Rec. p. 37a);

D. *The Application of Rates to the Shipment*—

	Uniform Classification Rating	Exceptions Rating	Rate ¢ CWT	Charge
Cooling Boxes	(55)	45	234	$468.84
Drying Machines	(60)	47½	248	17.48
Electric Stoves	(45-60)	40	209	60.28
Charge based on Exceptions Ratings				$546.60
Above Articles in One Car, Item 13980-A Mixed Carload (Rec. p. 42a and Opinion below p. 3);	55	None	215	$507.94

E. *Mixed Carload Rule*—Item 5

(Exception to the mixed carload rule 10 in the Uniform Freight Classification)

"Section 1.—Except as otherwise provided, when a number of articles for which the same or different ratings or rates are provided when in straight carloads are shipped at one time by one consignor to one consignee and destination, in a carload (see Rule 14), they will be charged at the actual or authorized estimated weight and at the straight carload class or commodity rate (not mixed carload rate) applicable to each article, except as provided in Rules 12 and 45. [Rules 12, 14, and 45 are not involved.] (Interpolation added.)

* * * *

"Section 4.—If a lower charge would result under the application of Section 1, * * * of this rule than under the provisions for a specific carload mixture, such lower charge will apply." (Rec. p. 38a);

F. *Non-Application of the New Class Rates*—Item 300-B

"Class rates published in tariff, as amended, will not apply where there is in effect on a given shipment a commodity rate, classification exception or column *rating* between the same points via any route." (Rec. p. 38a.) (Emphasis added.)

From these facts the Court of Appeals concluded: (1) That the Class 55 rating for the mixed carload shipment of household appliances as specified in Item 13980-A of the freight classification could not be applied to the shipment because the rule in Item 300-B does not permit the application of the new class rates where there is in effect an exceptions rating *"or ratings"*[5] on said mixed carload shipments, and (2) that the mixed carload rule in Item 5 has no application to the shipment because the rule in Item 300-B "otherwise provides".

Petitioner contends that such conclusions are erroneous as a matter of law in that they effect an approval of transportation rates contrary to the provisions of the rail carrier's published tariffs.

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[5] The term "ratings" is supplied by interpretation. (See Opinion below, p. 4.)

VI. JURISDICTION OF THE DISTRICT COURT

Jurisdiction to set aside and annul orders of the Interstate Commerce Commission is vested in the District Courts (Title 28, U. S. Code, §§1336 and 1398, and 49 U. S. Code, §17 (9)).

VII. ARGUMENT FOR ALLOWANCE OF WRIT

By statute, transportation services are made available to shippers only in accordance with the terms of published tariffs, and transportation companies are admonished to strictly conform to the provisions of such tariffs (Title 49, U.S. Code, §6(7)). Thus, a rate applied not in accordance with the provisions of the tariff is an unlawful rate. In this matter the Interstate Commerce Commission approved the application of an unlawful rate by an interpretation not in accord with the plain provisions of the tariff in question. That approval, being in error as a matter of law, should not have been sustained by the courts below.

(a) *The Erroneous Interpretation.* The shipment consists of a number of household appliances specifically provided for in Item 13980-A of the new freight classification. On the basis of that tariff provision the applicable freight charge is determined to be $507.94. However, this being a mixed carload shipment, it was subject to the mixed carload rule (Item 5) which provides that if a lower freight charge is determined by the straight carload class or commodity rate applicable to each article in the shipment then such lower charge will apply. In this instance, the computation on the basis of rates applicable to each article in the shipment produced a higher freight charge of $546.60.

The mixed carload rule (Item 5) operates by its terms in the following fashion: section 1 of the rule requires that freight charges, on a mixed carload shipment, shall be computed by the particular carload rate applicable to each article in the shipment and "except as otherwise provided" in section 4 of the rule the freight charges so determined will apply. Section 4 provides that the charges determined under section 1 will apply *only* if they are lower than charges determined under provisions for a specific carload mixture such as, for example, Item 13980-A.

In this respect, the error of the Court of Appeals is expressed in the following paragraph:

> "It is further claimed that neither the Commission or the District Court gave any consideration to Item 5 (Exception to the mixed-carload rule 10 in the Uniform Freight Classification.) This Item states 'Except as otherwise provided * * *.' It was otherwise provided in Item 300-B and hence Item 5 has no application."

Although the Court of Appeals held that Item 5 has no application to the shipment, it is significant that the freight charges found applicable were computed in accordance with the provisions of section 1 thereof. If, then, section 1 of the rule may be invoked, what of section 4 wherein it is provided that section 1 is applicable only if it produces the lower freight charge?[6]

There is no classification exception *rating* on this particular type of shipment. On the other hand, each article

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[6] A similar mixed carload rule, Item 110-G, is published as part of the so-called exceptions tariff. That rule also requires the application of the lowest of the alternative charges computed on a mixed carload shipment. However, the Commission states that Item 110-G cannot be used in connection with the Uniform Classification rating in Item 13980 (Rec. p. 20a.)

in the shipment, if shipped separately as a carload, would be subject to a classification exception rating. It was this fact which impelled the Commission to find that the word "rating" appearing in Item 300-B should be interpreted to mean "ratings". The Court of Appeals approves that interpretation on the grounds that the Commission found that the objective of the rail carriers "in publishing item 300 was to remove any possible alternation of the uniform class rates where exceptions ratings were established" (Opinion, p. 4). Yet, when Item 300 became effective, May 30, 1952, Item 5, the mixed carload rule providing for the alternative application of rates, also became effective in the same tariff. The plain design of these tariff rules manifests no intention by the carriers to remove "any possible alternation" of rates as applied to mixed carload shipments. The converse is evident. Tariff restrictions should be clear and not left to inference. *Armour & Co. v. Chicago, M. St. P. & Pac. R. Co.* (7th Cir.), 188 F. 2d 603, 610, cert. denied 342 U. S. 86. Administrative orders are void if the findings upon which they are made are "contrary to the 'indisputable character of the evidence' ". *Int. Com. Comm. v. Louis. & Nash. R.R.*, 227 U.S. 88.

The interpretation of the word "rating" to mean "ratings" was urged by the Commission on the basis of U.S. Code, Title 1, Section 1, "Rules of Construction". That rule as it relates to the contention made by defendants reads as follows:

> "In determining the meaning of any Act of Congress, unless the context indicates otherwise—
>
> words importing the singular include and apply to several persons, parties, or things; * * *."

Plainly, the rule of construction does not permit an administrative determination which is hostile to the major

objective of the railroad tariffs involved. *I.C.C. v. Railway Labor Assn.*, 315 U.S. 373, 380. The cardinal principle of statutory construction is to save, not destroy. The rule to be followed here was well stated by the Commission itself in *Schenley Industries, Inc., v. Central of Georgia Ry. Co.*, 287 I.C.C. 784, 786:

> "Tariffs must be construed according to the plain terms of the language employed, and where the language is unambiguous there is no need to resort to rules of tariff construction or interpretation. *Russel Motor Car Co. v. United States*, 261 U. S. 514." Cf. *Metropolitan Metals, Inc., v. Pennsylvania R. Co.*, 314 I.C.C. 737, 738.

A freight tariff must be construed in its entirety. *Armour & Co. v. Chicago, M. St. P. & Pac. R. Co., supra*, followed in *A. E. West Petroleum Co. v. Atchison, T. & S. F. Ry. Co. (Mo.)*, 108 F. Supp. 644, 648. In *United States v. Menasche*, 348 U.S. 528, at page 538, the Court said that effect should be given every clause of a statute to avoid an interpretation that would emasculate an entire portion of the statute. Here an interpretation would negate an entire tariff requirement as expressed in Item 13980-A and section 4 of Item 5, a long established requirement relating to a specific mixed carload *rating* applicable to mixed carload shipments of freight. Considering that tariff requirement the term "rating", as it appears in Item 300, cannot be given a plural meaning.[7]

In the past the Commission has struck down interpretations which lead to consequences not in accord with tariff

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[7] Another type of shipment before the Commission in the same proceeding was found subject to the application of the specific mixed carload rating under Item 13980-A by operation of the mixed carload rule, Item 5. That shipment differed from the shipment here involved in that the consist included some articles not subject to classification exceptions ratings. (Rec. pp. 18a-19a.)

provisions. For example, in *S. H. Kress & Co. v. Agwilines, Inc.*, 246 I.C.C. 655, the Commission said:

> "It is believed that the rule of statutory construction stated in *United States v. Ryan*, 284 U. S. 167, 175, is applicable here. The Court there said:
>
> > 'All laws are to be given a sensible construction. A literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose.'."

And in *Fine Products Corp. v. Gulf M. & O. R. Co.*, 299 I.C.C. 758, 760, Division 2 of the Commission, concerned with the meaning of tariff terms, stated:

> "A meaning which is clear from commercial or common usage, or from the context, may not be rendered obscure by resort to technical rules of grammar. *Liquid Carbonic Corp. v. Chicago, B. & Q. R. Co.*, 211 I.C.C. 365. Moreover, the provisions of a tariff must be considered in their entirety, and if those provisions may be said to express the intention of the framers under a fair and reasonable construction, that intention must be given effect."

Cf. *East Texas Lines v. Frozen Food Exp.*, 351 U. S. 49, 54.

Nevertheless, the Court of Appeals concludes that there is a rational basis for the Commission's orders and cites *Miss. Valley Barge Co. v. U. S.*, 292 U. S. 282. That case is no authority here. There the record before the Court consisted of the Interstate Commerce Commission's report and order and certain affidavits. None of the evidence received by the Commission was placed before the Court. The settled rule, said the Court, is that the findings of the Commission may not be assailed in the absence of the evidence upon which they were made, and it held that there

was a rational basis for the Commission's findings. That is not the instant case. Here, the facts upon which the Commission relied were before the Court below to enable it to determine whether the Commission, in the exercise of its adjudicatory powers, properly applied the law to the facts. In this instance the record demonstrates that the action of the Commission was arbitrary, capricious, and an abuse of discretion, and not in accordance with law (U. S. Code, Title 5, §1009(e)). The Court of Appeals should have so held.

(b) *The Importance of the Matter.* The matter is important to petitioner, of course, because of the considerable number of shipments involved in this litigation. But of further significance is the departure in this case from firmly established principles of tariff construction which are of interest to all shippers whose business transactions with carriers fall within the ambit of the Interstate Commerce Act.

Those principles have been enunciated by the Court of Appeals, Fifth Circuit, thusly:

> "Courts may not strike down the plain and unambiguous terms of tariffs set up and approved by the Interstate Commerce Commission. It has long been settled that a published tariff rate is to be treated as though it were a statute binding upon both the carrier and the shipper, and that it must be strictly applied regardless of hardships that may arise from its application in particular cases." *Bull S.S. Lines v. Thompson,* 123 F. 2d 943, cert. denied 315 U. S. 816.

And the Court of Appeals, District of Columbia Circuit, calls attention to these principles in the following quotation from a decision in the Eighth Circuit:

> "'A rate tariff is in essence a statement by the carrier to possible shippers that it will furnish certain services under certain conditions for a certain price. When a tariff has become legally promulgated, it is binding upon both the carrier and any shipper taking advantage of it, and its terms (in essence) become, in such respects, the only contract between the two allowed by law. Since the tariff is written by the carrier, all ambiguities or reasonable doubts as to its meaning must be resolved against the carrier. Not only is this simply an application of the general rule as to construction of written contracts and instruments, but, when the place occupied by transportation and the situation of shippers are considered, it is particularly useful in application to tariffs. The construction should be that meaning which the words used might reasonably carry to the shippers to whom they are addressed.' Union Wire Rope Corp. v. Atchison, T. & S. F. Ry. Co., 8 Cir., 66 F. 2d 965, 966-967, certiorari denied 290 U. S. 686, 54 S. Ct. 122, 78 L. Ed. 591." *United States v. Interstate Commerce Commission*, 198 F. 2d 958, cert. denied 344 U. S. 893.

The judgment here challenged runs counter to well understood rules of tariff construction frequently expressed by the Commission and restated by the Fifth Circuit Court of Appeals in *Bull S. S. Lines v. Thompson, supra*, by the Court of Appeals, District of Columbia Circuit, in *United States v. Interstate Commerce Commission, supra*, and by the Seventh Circuit Court of Appeals in *Armour & Co. v. Chicago, M. St. P. & Pac. R. Co., supra.*

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said

Appellate Court had in the case numbered and entitled on its docket, No. 14,594, General Motors Corporation, plaintiff-appellant v. United States of America and Interstate Commerce Commission, defendants-appellees, and The Alabama Great Southern Railroad Company, *et al.*, intervening defendants-appellees, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said Appellate Court be reversed by the Court, and for such further relief as to this Court may deem proper.

Respectfully submitted,

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Dated: May 21, 1962.

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 992

GENERAL MOTORS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner brought this suit in the district court against the United States and the Interstate Commerce Commission to set aside as arbitrary and unlawful an order of the Commission denying petitioner's claim against a number of railroads for reparations based on asserted overcharges on certain freight shipments (2a–5a).[1] The overcharges assertedly arose because the railroads computed their charges on one tariff (exceptions to class rates), while petitioner contended that they should have been based upon another tariff (mixed carload rating of the classification schedule). The railroads intervened as defendants and urged, as did the Commission itself, that the

[1] References are to the Appendix to petitioner's brief in the court of appeals.

order was lawful (30a, 31a). The United States, as statutory defendant, took no part in the district court proceedings other than to file an answer which neither opposed nor defended the Commission's order.

The district court ruled that, since petitioner had elected initially to bring its reparations claim before the Commission, rather than in a district court, Section 9 of the Interstate Commerce Act (49 U.S.C. 9) precluded the court from reviewing the Commission order (32a–35a).[2] The district court further held that "on the merits" there was a rational basis for the Commission's conclusions and order. The court entered an order dismissing the complaint (37a).

On appeal to the Court of Appeals for the Sixth Circuit, the United States filed a brief and presented oral argument, urging that the district court had jurisdiction to review the Commission's order.[3] It took no position on the merits, that is, whether the Commission's order was valid. Both the Commission and the railroads conceded in the court of appeals that the district court had jurisdiction to review the Commission's order, and the court of appeals so held. 299 F.

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[2] Section 9 gives any person who claims to have been damaged by a rail carrier the right to file a complaint before the Commission or to sue for damages in the district court, "but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

[3] *United States* v. *Interstate Commerce Commission*, 337 U.S. 426; *Great Lakes Steel Corp.* v. *United States*, 337 U.S. 952. See also, *Union Pacific R.* v. *Price*, 360 U.S. 601, 615, 618.

2d 233, 234. The court further ruled that the Commission's order was sustained by substantial evidence and was lawful, and affirmed the district court's ruling on that ground. 299 F. 2d at 234–236.

The petitioner raises no question as to the jurisdiction of the district court. Since that was the only issue on which the United States took a position in the court of appeals, we leave the defense of the merits of the Commission's order to that agency. We note, however, that the question presented concerns the application of established rules of construction to the particular tariffs involved (Pet., p. 3); and that the problem of tariff construction involved in this case apparently has no prospective application, because the carriers have published a rule specifying that the lower tariff applies. (Brief in Opposition for Interstate Commerce Commission, pp. 3, 7, fn. 9). In these circumstances, further review appears unwarranted.

Respectfully submitted,

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Solicitor General.

JUNE, 1962.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RAILROAD RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF RAILROAD RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the United States District Court for the Eastern District of Michigan, Southern Division, is reported in *General Motors Corporation* v. *United States*, 193 F. Supp. 198.

The opinion of the United States Court of Appeals for the Sixth Circuit is reported in *General Motors Corporation* v. *United States*, 299 F. 2d 233.

Statement of the Case

This litigation concerns the lawfulness of freight charges assessed by these respondents on numerous mixed carload shipments of household appliances shipped by the petitioner in interstate commerce.

The lawfulness of the assailed freight charges was initially challenged in a complaint proceeding before the Interstate Commerce Commission. The validity of the Commission orders issued in that proceeding were thereupon made the subject of a complaint in the District Court. When the District Court rendered a decision adverse to the petitioner its decision was appealed to the Court of Appeals. The petitioner now seeks to have the matter reviewed by this Court.

A. The Proceeding Before The Interstate Commerce Commission.

By complaint filed with the Interstate Commerce Commission on March 7, 1955, the freight charges assessed by the respondents were alleged to have been unlawful and in violation of the Interstate Commerce Act (49 U.S.C.).

In a *Report of the Commission*, by Division 2, decided June 26, 1957, 301 I.C.C. 59, the assailed rates and charges were found inapplicable, the applicable rates were determined, and reparation was awarded.

Thereafter, the Commission reopened the proceeding upon a petition of these respondents, and in the *Report of the Commission on Reconsideration*, decided April 20, 1959, 306 I.C.C. 345, the assailed rates and charges were found applicable in some instances and inapplicable in others. In the latter case the applicable rates were determined, reparation was awarded, and the prior findings

of the Commission, by Division 2, were modified accordingly.

On or about June 2, 1959, the complainant filed a petition seeking the reopening, reconsideration and modification of the *Report of the Commission on Reconsideration*, to which the defendants replied on or about July 17, 1959. By order dated November 9, 1959, the Commission denied that petition "for the reason that the matters submitted in support thereof do not constitute substantial and material grounds to warrant reopening of this proceeding for reconsideration".

B. The Proceeding Before The District Court.

By complaint filed in the United States District Court for the Eastern District of Michigan, Southern Division, on June 9, 1959, the petitioner sought to set aside the Commission orders, alleging that the "decision and requirement" of the Commission in the proceeding before it and the resulting orders issued therein were "predicated upon an erroneous reading of the railroad tariffs and in consequence thereof is arbitrary, capricious, and without support of law or evidence, * * * contrary to the mandate of the Interstate Commerce Act requiring the railroads to assess for transportation only the exact published tariff rate and charge (49 U.S.C. § 6(7))". The prayer of the complaint was that the decision and requirement of the Commission dated April 20, 1959, and the order of the Commission dated November 9, 1959, each be set aside and declared null and void.

The District Court held that since the matter presented only an issue of reparations, the Court could not review the orders of the Commission. Nevertheless, it proceeded to deal with the merits of the case and found that there was a rational basis for the conclusions of the Commission. It accordingly denied the relief prayed for and dismissed the complaint.

C. The Proceeding Before The Court Of Appeals.

The petitioner appealed the denial of the relief prayed for and the dismissal of its complaint by the District Court to the Court of Appeals. That Court held that the District Court erred in holding that it had no jurisdiction.*

In dealing with the merits of the case, the Court of Appeals stated its function was limited to determining whether the order of the Commission was supported by substantial evidence and correctly applied the law (citing *Great Lakes Steel Corp.* v. *United States*, 220 F. 2d 751, cert. denied 350 U. S. 821). It reviewed the proceeding before the Commission, and noted the defendants' objective in publishing their tariff provisions. The Court stated that the Commission, in upholding the contentions of these respondents with respect to the provisions of their published tariffs, construed those provisions in the light of their history and what they were intended to accomplish. The Court concluded that the decision of the Commission was supported by substantial evidence and correctly applied the rules of law. It also concluded that there was certainly a rational basis for the conclusion which it reached, as the District Court had also done, citing *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282.

The Court of Appeals accordingly affirmed the judgment of the District Court upholding the order of the Commission and dismissing the complaint.

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* In the District Court the Interstate Commerce Commission contended that the Court had no jurisdiction to review its order denying reparation. However, in the Court of Appeals the Commission conceded that the District Court had jurisdiction to review its order denying reparation. Since all parties are in agreement on that point, it is no longer an issue.

Argument

The petitioner seeks a writ of certiorari on the purported ground that the Interstate Commerce Commission approved the application of an unlawful rate by an interpretation not in accord with the plain provisions of a published tariff, and that approval, being in error as a matter of law, should not have been sustained by the courts below. But what the petitioner is actually seeking is to have this Court substitute its judgment for the informed judgment and experience of the entire Commission, something which this Court has repeatedly said is beyond the judicial function.

The gist of the petitioner's argument is that the Commission made an erroneous interpretation of certain of the respondents' tariff provisions, the result of which was to find a basis of rates and charges legally applicable on the petitioner's shipments which the petitioner had complained of as being excessive.

Under the provisions of Section 9 of the Interstate Commerce Act, 49 U.S.C. § 9, the petitioner had a right to file a complaint with the Interstate Commerce Commission or to file suit in any district court of the United States of competent jurisdiction, to determine whether the freight charges assessed by these respondents or those contended for by the petitioner were legally applicable on the involved shipments. Having elected to file a complaint with the Interstate Commerce Commission, the petitioner became bound by that election, subject only to a right to judicial review of the proceeding before the Commission and of any order issued as a result thereof.

The nature and scope of that review has heretofore been made clear by this Court.

In *Int. Com. Comm.* v. *Union Pacific R.R.*, 222 U. S. 541, this Court said:

> "There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus

far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Int. Com. Comm.* v. *Ill. Cent.*, 215 U. S. 452, 470; *Southern Pacific* v. *Int. Com. Comm.*, 219 U. S. 433; *Int. Com. Comm.* v. *Northern Pacific*, 216 U. S. 538; 544; *Int. Com. Comm.* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 174.

"In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Ill. Cent.* v. *I.C.C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order." (pp. 547-548)

In *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, this Court indicated (p. 481) that the judgment and discretion of the Commission and its decisions, made the basis of administrative orders* are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power, citing *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 170. The Court then added:

> "The conclusions were reached after full hearing, are not without support in the evidence, and we are unable to say that they show an abuse of discretion. It may be conceded that the evidence would have warranted a different finding; indeed the first report of the Commission was to the contrary; but to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission upon a matter purely administrative, and this can not be done. *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320; *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361." (p. 482)

In *Miss. Valley Barge Co.* v. *U. S.*, *supra*, this Court said:

> "The structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form. Florida v. United States, ante, p. 1. It is not the province of a court to absorb this function to itself. *I.C.C.* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 100; *Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268, 271;

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* Referring in that particular instance to orders operating *in futuro*.

Virginian Ry. Co. v. *United States*, 272 U. S. 658, 663. The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body". (pp. 286-287).

A. The Findings Of The Commission Are Conclusive.

In support of its contention that the Commission erroneously interpreted and applied the respondents' published tariff provisions, and thus made the disposition of the complaint before it "arbitrary, capricious, and without support of law or evidence", the petitioner introduced as evidence in the District Court proceeding only a portion of the evidence introduced in the proceeding before the Commission.

This Court has heretofore stated that an order of the Commission may not be assailed on the ground that it was unsupported by evidence, or not supported by sufficient evidence, when the whole of the evidence before the Commission is not produced. *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, 125; *Louisiana & P. B. Ry. Co.* v. *United States*, 257 U. S. 114, 116; *Edward Hines Trustees* v. *U. S.*, 263 U. S. 143, 184. That defect alone, these respondents respectfully submit, is sufficient to justify a refusal by this Court to grant the writ prayed for. In any event, where in instances of this kind a party fails to introduce in evidence in the District Court proceeding the whole of the evidence introduced in the proceeding before the Commission, the settled rule laid down by this Court is that the findings of the Commission are necessarily conclusive. *Nashville Ry.* v. *Tennessee*, 262 U. S. 318, 324; *Chicago, I. & L. Ry.* v. *U. S.*, 270 U. S. 287, 295; *Miss. Valley Barge Co.* v. *U. S.* (*supra*).

B. There Was A Rational Basis For The Conclusions Of The Commission.

In its decision the Court of Appeals quite aptly stated (p. 235) that the only question in the proceeding before

the Commission was which of two tariff bases of freight charges was legally applicable on the petitioner's shipments, namely, "the old exceptions tariff and rates or the new uniform classification ratings and new class rates". The Commission found that "the old exceptions tariff and rates" was the legally applicable basis, and its findings have been upheld by both lower courts. Yet, the petitioner continues to argue that "the new uniform classification ratings and new class rates" were legally applicable on the involved shipments, refusing to accept the findings of the Interstate Commerce Commission despite the fact that in instances of this kind such administrative findings are binding on the courts in the absence of proof of any error of law on the part of the Commission.

The proceeding before the Commission was a direct outgrowth of the reports of the Commission in *Class Rate Investigation, 1939**, and *Consolidated Freight Classification***, 262 I.C.C. 447; 264 I.C.C. 41; 268 I.C.C. 577; 281 I.C.C. 213; 281 I.C.C. 329; and 286 I.C.C. 171. The latter was a companion to the former proceeding.

In Docket No. 28300, the Commission prescribed a single scale of class rates for application throughout the United States east of the Rocky Mountains. In Docket No. 28310, the Commission required the respondent railroads to publish a single uniform freight classification to be applied in connection with the class rates prescribed in Docket No. 28300. However, it did not prescribe or pass upon the propriety of any particular item in that classification.

The tariffs which gave effect to the orders of the Commission in those proceedings were published effective May 30, 1952. They were the tariffs publishing "the new uniform classification ratings and new class rates" referred to by the Court of Appeals (p. 235). Uniform Freight

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* Sometimes referred to as Docket No. 28300.

** Sometimes referred to as Docket No. 28310.

Classification No. 1, published in compliance with the order of the Commission in Docket No. 28310, did not cancel the Illinois, Official, Southern and Western Classifications previously in effect. Neither did the various tariffs publishing the class rate scales prescribed by the Commission in Docket No. 28300 cancel a single one of the existing tariffs publishing the several previously prescribed class rate scales. On the contrary, the four classifications just referred to, together with the previously prescribed class rate scales applicable in connection with those classifications, continue to apply on export, import, coastwise and intercoastal traffic to this very day.

On and after May 30, 1952, the several previously prescribed class rate scales continued to apply in connection with ratings published and applicable prior to that date as "exceptions" to one or more of the four classifications referred to. Those "exception ratings", together with the previously prescribed class rates in connection with which they applied, were the "exception rates" which the Commission repeatedly stated were not within the scope of its investigations in Dockets Nos. 28300 and 28310. As a matter of fact, in *New York* v. *United States*, 331 U. S. 284, this court itself observed (p. 330) that the Commission was not dealing with exception and commodity rates in those proceedings. Those so-called "exception rates" or specific commodity rates applied to more than 95 percent of the total traffic handled by the respondent railroads throughout Docket No. 28300 territory, and were "the old exceptions tariffs and rates" referred to by the Court of Appeals (p. 235).

A rating, rate, rule or regulation published as an "exception" to a classification governing a tariff publishing class rates, or a so-called commodity rate, supersedes and takes precedence over any rating, rate, rule or regulation published in the governing classification itself.

In the *Report of the Commission on Reconsideration, supra*, the entire Commission concluded that exception

bases of rates were lawfully published and legally applicable on one of the two types of shipments with respect to which complaint had been made to the Commmission, and it is that determination by the Commission which is alleged to be "arbitrary, capricious, and without support of law or evidence". That allegation rests on the contention of the petitioner that the Court of Appeals, like the Commission, rested its conclusion on the provisions of Item 300-B, and that neither the Court nor the Commission gave any consideration to Item 5. The petitioner argues that by construing the word "rating" in Item 300-B to mean "ratings" both the Court and the Commission indulged in "unwarranted liberalization". The same contention was advanced and argued at considerable length in the lower Court proceedings, as it had been in the Commission proceeding. There is clearly no merit to that contention, as both the Commission and the lower courts found.

Each of the class rate tariffs publishing the single scale of class rates prescribed by the Commission in Docket No. 28300, for application in connection with the classification ratings published in the single uniform freight classification which the railroads were required to publish in compliance with an order of the Commission in Docket No. 28310, contained a provision identified as Item No. 300 or Item No. 300-B. That provision expressly made the Docket 28300-28310 bases of class rates and charges inapplicable in any case where a commodity rate, classification exception, or column "rating" was in effect.

A specific exception rating was published for application on each of the four commodities included in the particular type of mixed carload shipment with which this action is concerned. In addition, a rule* was published as a specific exception to the governing classification expressly providing that any or all of the articles referred

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* Item 110-G of Agent Hinsch's Tariff I.C.C. No. 4106.

to could be shipped in mixed carloads. Paragraph (a) of that rule provided in effect that charges on the articles included in the mixed carload would be assessed on the basis of their respective carload rates, subject to a carload minimum weight of 20,000 pounds. The respective carload rates were those determined by the specific exception ratings referred to.

Because Item No. 300 or Item No. 300-B speaks of a "rating" rather than "ratings", the petitioner argues that the Commission liberalized the term "rating". Obviously, there was a "rating" and, to the extent that there was a "rating", the rule in the Docket 28300 class rate tariffs made the Docket 28300-28310 bases of rates and charges inapplicable. Since there was a specific rating for each of the four articles included in each shipment of the particular type in question, Item No. 300 or Item No. 300-B in the class rate tariff made the Docket 28300-28310 bases of rates and charges inapplicable on each of the four articles. The rule applied to each "rating" individually and, incidentally and necessarily, to all four articles collectively.

The important fact is that the petitioner's argument deals only with the provisions of the tariffs publishing "the new uniform classification ratings and class rates" and completely disregards the provisions of other tariffs which published "the old exceptions rates". The latter tariffs published "exceptions" which were legally applicable on May 29, 1952. Those "exceptions" were not involved in Dockets 28300 and 28310, and continued to apply on and after May 30, 1952, when the tariffs publishing "the new uniform classification ratings and new class rates" became effective.

What the petitioner continues to overlook is that all of the tariffs publishing "the new uniform classification and new class rates", including "Item 5", applied and were intended to apply only on traffic which was within the scope of the Docket 28300 and 28310 proceedings.

It can hardly be contended seriously, logically, or reasonably, that in such an instance the Commission liberalized "the term 'rating' to mean 'rating' as said term is used in a tariff rule". The clear purpose, intent, and legal effect of Item No. 300 was to specifically preclude the application of the Docket 28300-28310 bases of rates and charges published effective May 30, 1952, on traffic which prior to that date had moved under previously published exception ratings or commodity rates which were not involved in the Docket 28300-28310 proceedings. The publication of the uniform classification basis, effective May 30, 1952, did not nullify the classification exceptions which were applicable on these or any other commodities for which exception ratings were in effect and applicable on May 29, 1952.

The meaning and intent of Item No. 300, as originally published and as later amended, had previously had the careful consideration of the entire Commission, as shown in the *Report of the Commission on Reconsideration, supra.* The same conclusion here was entirely consistent with that prior extensive consideration.

The *Report of the Commission on Reconsideration, supra,* indicates clearly that in disposing of the complaint before it the Commission gave consideration not only to Item 300-B but also to Item 5. In reaching its conclusions the Commission said:

> "It is a well-understood principle that in ascertaining the meaning of the language of a tariff, the object sought to be accomplished is to be considered, and if the language is fairly susceptible of reasonably plain meaning, that construction should be put thereon. *Peterson Biddick Co.* v. *Chicago, B. & Q. R. Co.,* 151 I.C.C. 376, 377. The defendants' objective in publishing item 300 was to remove any possible alternation of the uniform class rates where exceptions ratings were established, and the original phrasing of the provision makes that fact abundantly clear. The question then is, did the substitution of 'on a

given shipment' for 'on any article or commodity' so alter the meaning of the provision as to warrant a determination that the original objective also was intended to be changed. Bearing in mind the reason for the amendment of the language, we think that a fair and reasonable interpretation of the provision is that where an exceptions rating or ratings (in the case of mixed-carload quantities) were in effect 'on a given shipment', the uniform class rates could not be considered in determining the applicable charges."

In its opinion the District Court noted (p. 200) the fact that "the parties appear to agree that if there is a judicial review, it should be restricted to a determination of whether there was a 'rational' basis for the Commission's orders" which, said the Court, was just another way of saying that the orders must be supported by substantial evidence. The Court set forth the various "ratings" involved in the case, the rule (Item 300) adopted to preserve the exception ratings, together with the reasons therefor. Thereafter the Court quoted part of the quotation from the *Report of the Commission on Reconsideration* set forth above, and then said:

> "Without going into plaintiff's interpretation of the above section, this court cannot deny that there is a 'rational' basis for the Commission's conclusions. Their main consideration was the object sought to be accomplished and they applied a reasonable construction of the language to accomplish it. We cannot draw conjecture as to what our interpretation would have been had this case been presented here in the first instance. We are satisfied that the Commission's orders were the result of the consideration of all the evidence and applying an interpretation commensurate with that evidence." (p. 201)

In its opinion the Court of Appeals reviewed the matter in substantially the same manner, and, in affirming the judgment of the District Court, held that there was a rational basis for the conclusions of the Commission.

Even disregarding the fact that the findings of the Commission could not be assailed and had to be assumed to be supported by substantial evidence, it is nevertheless clear that (1) the Commission did consider all the evidence and in the exercise of its administrative expertise concluded that the assailed basis of rates and charges was applicable; (2) the findings and conclusions of the Commission were supported by substantial evidence; and (3) there was a rational basis for its findings and conclusions.

In *General Motors Corporation* v. *United States*, 149 F. Supp. 689, in addition to holding that court review of Commission orders "is limited to finding whether there was substantial evidence supporting any findings of fact made by the Commission and whether the conclusions of the Commission were in accordance with the standards set by Congress", citing *United States* v. *I.C.C.*, 337 U. S. 426, the court held, as a matter of law, that where "the issue is the proper interpretation of the tariffs of a common carrier, the court will give great weight to the interpretation of the Commission since such determinations have been placed by Congress within the Commission's field of special competence".

Here, as in *General Motors Corporation* v. *United States, supra*, the contention of the petitioner that there is no rational basis for the assailed orders is clearly without merit.

Conclusion

These respondents respectfully submit that there was a rational basis for the conclusions and findings of the Commission, as both lower courts held, and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. Edgar McDonald,
466 Lexington Avenue,
New York 17, N. Y.,
Attorney for Railroad Respondents.

Certificate of Service

I, J. EDGAR MCDONALD, attorney of record, for the railroad respondents in this proceeding, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have today served copies of this brief on the several parties to this action as follows:

1. On the petitioner, General Motors Corporation, by mailing copies thereof in duly addressed envelopes, with air mail postage prepaid, to its attorneys of record, Aloysius F. Power, 3044 West Grand Boulevard, Detroit 2, Michigan, Walter R. Frizzell, 3044 West Grand Boulevard, Detroit 2, Michigan, and E. J. McGratty, Jr., 3044 West Grand Boulevard, Detroit 2, Michigan.

2. On the Interstate Commerce Commission, by mailing copies thereof in duly addressed envelopes, with first class postage prepaid, to its attorneys of record, Robert W. Ginnane, General Counsel, and Arthur J. Cerra, Assistant General Counsel, Washington 25, D. C.

3. On the United States of America, by mailing copies thereof in duly addressed envelopes, with first class postage prepaid, to its attorneys of record, William H. Orrick, Jr., Assistant Attorney General, Lawrence Gubow, United States Attorney, Morton Hollander, Attorney, and David L. Rose, Attorney, Department of Justice, Washington 25, D. C.

This 21st day of June, 1962.

J. EDGAR MCDONALD,
466 Lexington Avenue,
New York 17, N. Y.

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In the Supreme Court of the United States

OCTOBER TERM, A.D. 1961

No. 992

GENERAL MOTORS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION
and
THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court below is reported in 299 F. 2d 233. The rep . and order of the Interstate Commerce Commission is reported in 306 I.C.C. 345.

JURISDICTION

The judgment of the court below was entered on February 17, 1962, and a timely petition for rehearing was denied on March 31, 1962. The petition for writ of certiorari was filed on May 23, 1962. The jurisdiction of this Court is invoked under Title 28, United States Code, section 1254.

QUESTION PRESENTED

Whether the order of the Interstate Commerce Commission, in construing the tariff provisions in light of their history and what they were intended to accomplish, and in deciding that the railroads properly applied their published tariffs, was supported by substantial evidence, correctly applied the rules of law, and had a rational basis.

STATUTES INVOLVED

Section 6(7) of the Interstate Commerce Act, 49 U.S.C.A. 6(7) provides:

> No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than

the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariff.

STATEMENT

The judgment of the court below affirms the decision of the District Court sustaining orders of the Commission which denied, in part, petitioner's request for reparation upon a determination that the rates charged and collected by the respondent railroads were the applicable rates under the rail carrier's published tariffs.

There is no dispute concerning the facts, the freight tariffs to be considered, the measure of the rates, or the fact that the tariffs were amended on August 20, 1956, to eliminate the controversy.[1]

The shipments in question were mixed carloads of household appliances consisting of cooling boxes or refrigerators, cooling or freezing apparatus combined, household laundry drying machines, and electric stoves and ranges from Moraine, Ohio, to Miami, Florida.[2] These shipments were made during the period from May 30, 1952, to August 20, 1956.

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[1] Effective that date, the railroads established reduced exceptions ratings in connection with the new class rates on household appliances.

[2] One shipment between the points listed was stipulated to be representative of many others.

Prior to May 30, 1952, the published tariffs of the railroads provided a class rate structure which applied within and between the several rate territories of the country.[3] Each territory was controlled by a separate classification. Generally, a class rate structure is like a blanket or web and provides rates between any two points as determined by the classification ratings. Exceptions to a classification provide ratings, either higher or lower than classification ratings, and take precedent over the classification basis. Commodity rates, which are not involved in this proceeding, render inapplicable both classification and exceptions ratings and rates. See, *e.g.*, Docket No. 28300, *Class Rate Investigation, 1939*, 262 I.C.C. 447, at 456.

On May 30, 1952, the railroads established a new uniform class rate scale and a new uniform classification to govern those rates in compliance with the orders of the Commission in Docket Nos. 28300[4] and 28310.[5] In Docket Nos. 28300 and 28310, the Commission made the most extensive readjustment of classifications and underlying class rate structures in the entire history of rate making.[6] In Docket No. 28300, a single uniform class rate structure was pre-

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[3] Official, Southern, Southwestern and Western Trunk Line Territories.

[4] *Class Rate Investigation, 1939*, 262 I.C.C. 447; 264 I.C.C. 41; and 281 I.C.C. 213.

[5] *Consolidated Classification*, 281 I.C.C. 329.

[6] In scope of territory, number of commodities, and carrier revenues affected thereby.

scribed by the Commission between all points in the United States east of Mountain Pacific Territory. In Docket No. 28310, the Commission ordered the railroads to prepare and apply a uniform classification throughout the United States.[1] In No. 28300, it was made clear that the proceeding contemplated class rates only and that neither commodity rates nor exceptions ratings were embraced in that proceeding. See 262 I.C.C. 447, 454, 512; 264 I.C.C. 41, 54; 281 I.C.C. 213, 285. In affirming the above orders in *New York* v. *United States*, 331 U.S. 284, this Court emphasized (at page 330) that:

> * * * The orders of the Commission affect class rates alone, the Commission not dealing with exception and commodity rates.

The new class rates prescribed by the Commission are lower than the old class rates, and shipments subject to exceptions ratings governing the old class rates are charged more than they would be if subject to the new class rates and new uniform classification. In computing charges on mixed carloads of household appliances prior to May 30, 1952, the tariff authorized an alternation, that is, it authorized the computation of charges under the exceptions ratings and rates as compared to the old classification ratings and rates, and the basis which produced the lower sum was the only legal charge which could be applied. In No. 28300, shipping interests sought to have the Com-

[1] The uniform classification ratings were not prescribed by the Commission, the task of establishing them being left to the railroads.

mission require the railroads to alternate the old exceptions ratings and rates with the new uniform ratings and rates, and to apply the lower basis (264 I.C.C. 41, 54-56), or that the Commission require the cancellation of the old exceptions ratings and rates (281 I.C.C. 213, 285). The Commission declined, pointing out that exceptions ratings and rates are not within the scope of the issues in No. 28300. By so doing, the Commission recognized the existence of a dual class rate structure.

The publication by the railroads of the new uniform classification ratings and a single scale of class rates to apply in connection therewith, required by the Commission's orders, marked only one step in the general revision of the overall rate structure of the country. The orders in the above Dockets, Nos. 28300 and 28310, plainly indicated that the Commission expected the railroads to weave the old exceptions and commodity ratings and rates into the uniform classification and uniform class rates scale. This involved a tremendous task of study and labor, for all of the railroads' traffic, except an insignificant portion thereof, moved, and continues to move, under exceptions ratings or commodity rates * rather than on the classification basis.

In order to preserve the old class rates applicable in connection with exceptions ratings until this task

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* There are tremendous variations in the level of these ratings and rates in the several rate territorial sections of the country and a great diversity of factors, competitive and otherwise, led to their initial establishment.

was accomplished, and at the same time to establish the new uniform classification ratings and class rates, the railroads published a rule, Item 300-B, in the new class rates tariff which provided that the new class rates would not apply where a commodity rate or exception or column rating is in effect.[9]

Under authority of the above Item 300-B in the new tariff, the railroads applied the exceptions ratings to the old classifications and the old class rates, based upon the individual rating of each separate article in the shipment, and collected a total charge of $546.60.

Petitioner complained to the Commission that the railroads were incorrectly interpreting their published tariffs in applying the old exceptions ratings and rates rather than the new uniform classification ratings and class rates. The new uniform classification rated each article shipped separately, but contained a specific mixed carload rating of class 55

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[9] Generally speaking, the task has not yet been fully completed. However, certain shippers petitioned the Commission for relief and the Commission, on its own motion, instituted a proceeding entitled Docket No. 32482, *In the Matter of an Alternate Rule Governing Applicable Charges Lower under Docket 28300 Class Rates Than under Exceptions or Commodity Rates.* The petition requesting the relief clearly indicated that the commodity and exceptions basis is considered by the shippers and the railroads as applicable because Item 300 in the new class rates tariff effectively prevented use of the new class rates. Since the railroads had not woven the exceptions and commodity rates into the new uniform class rate basis as instructed by the Commission, the petition requested that an alternation be ordered. The proceeding was dismissed on June 28, 1960, when the railroads published a rule permitting the alternation.

(Item 13980) which produced a lower total charge of $507.94.

The only question presented for determination by the Commission was which one of the two tariffs applied to the shipments in question, the old exceptions ratings and rates or the new uniform classifications ratings and new class rates.

In affirming the judgment of the District Court, the Court below unanimously concluded that the Commission's order, construing the tariff provisions in light of their history and what they were intended to accomplish, and in holding that the railroads properly applied the old exceptions ratings and rates, was supported by substantial evidence, correctly applied the rules of law, and had a rational basis.

ARGUMENT

This case presents no substantial question warranting consideration by this Court. Petitioner seeks essentially to challenge the substantiality of the findings and evidence supporting the Commission's order. It disputes the wisdom with which the Commission resolved the unambiguous tariff applicability question in accordance with its history, the expressed intentions of the Commission in prescribing the new uniform class rates and classifications, and the objective of the railroads, in publishing Item 300-B, to remove any possible alternation of the new uniform class rates where exceptions ratings were established. Each branch of the attack has been thoroughly considered and properly rejected by the court below in affirming the judgment of the District Court sustaining the

Commission's order. There is no conflict of decisions among the various circuits and no need for further review.

1. Petitioner argues (Pet. 8) that the courts below erred as a matter of law in sustaining the Commission's approval of the railroad's application of exceptions ratings and rates rather than the new uniform ratings and rates. It alleges that such an interpretation is contrary to the published provisions of the tariff and produces an illegal rate in violation of section 6(7) of the Act, 49 U.S.C.A. 6(7). But, like the Commission, the courts below found this assertion to be in direct conflict with the stated provisions of the tariffs, and what they were intended to accomplish. The courts below correctly held that the history of proceedings in which the new uniform rates were prescribed clearly shows that the Commission intended that the old rates based on exceptions ratings were not cancelled or suspended by the publication of the new class rate structure and that the objective of the railroads "in publishing item 300 was to remove any possible alternation of the uniform class rates where exceptions ratings were established." The plain design of this tariff rule manifests a clear intention by the rail carriers to remove any possible alternation of the exceptions ratings and rates with the new uniform ratings and rates.

Based on the plain wording of Item 300-B, restricting the application of the new rates and classifications where exceptions ratings are in effect, it cannot be denied that there is a rational basis for the conclusions of the Commission. Petitioner argues here,

as it did in the administrative proceeding and before the courts below, that the Commission's use of the plural "ratings" for the singular "rating" in Item 300-B was error. Petitioner urges that the proper interpretation of the Item 300-B restriction applies only where there is provided a single classification exceptions rating "on a given shipment." It argues that the Commission's construction of the terms of Item 300-B and its conclusions flowing therefrom render meaningless an otherwise effective classification rating (Item 13980-A) and its governing rule (Item 5), and that there is no clear finding that any such consequences were intended as would deprive shippers of the right to use effective provisions of the carriers' tariffs. Obviously, this contention lacks merit. The Commission made a specific finding on this point. (See 306 I.C.C. at 347-8).

Moreover, the Commission's use of the plural "ratings" where only the singular "rating" was used in Item 300-B, is in accordance with the plain meaning of the term, the intention of the railroads in publishing the new class rates scale, and the applicable law. The United States Code, Title 1, Section 1, Rules of Construction, provides that when determining the meaning of any act or resolution of Congress "Words imparting the singular number may extend and be applied to several persons or things." In a recent case, this Court affirmed a Commission determination that joint control by two railroads over a third railroad falls within the long haul protection of section 15(4) of the Act, despite the fact that the language of the statute is framed in the singular.

See *Chicago, Milwaukee, St. Paul & Pacific R. Co.* v. *United States, et al.*, 366 U.S. 745 (1961). Since a tariff is to be considered like a statute, *Penn. R.R. Co.* v. *International Coal Co.*, 230 U.S. 184, 197; *Lowden* v. *Simonds-Shields-Lansdale Co.*, 306 U.S. 516, 520, it follows that the Commission may also fairly construe the singular number to extend to the plural number where, as here, that course is necessary to accomplish the plain meaning and evident purpose and object of Item 300-B of the new class rates tariff.

In sum, the court below found that the Commission correctly construed the applicable tariff provisions in the light of their history and what they were intended to accomplish and that its decision is supported by substantial evidence and correctly applied the rules of law. This issue is not one which warrants further review. *Radio Corp. of America* v. *United States*, 341 U.S. 412, 420; *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 491.

2. Contrary to the allegation of petitioner (Pet. 13), there is no conflict of decision between the various circuits regarding rules of tariff construction. The cases cited (Pet. 13-14) do not support this allegation that the courts are divided on the question of tariff applicability. The Commission considered the provisions of the tariffs in their entirety, and determined that a fair, reasonable and sensible construction thereof expressed the intention of the railroads and accomplished the result sought to be achieved by the Commission in prescribing uniform class rates and in ordering publication of a uniform classification. The orders of the Commission are in strict conformity

with the statutory requirements of section 6(7) of the Act as they permit the collection of those charges for a transportation service which is specified in the carriers' published tariffs.

When, as the lower court found to be the case here, the Commission's findings are supported by substantial evidence; that it applied proper rules of law; and that its conclusion is rational, petitioner may not complain that it would prefer the matter to be decided more to its own advantage. *Mississippi Valley Barge Lines* v. *United States*, 292 U.S. 282, 286-287; *Manufacturers Ry. Co.* v. *United States*, 246 U.S. 457, 482; *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488; *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 139.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition presents no issue warranting consideration by this Court; that the judgment of the court below is correct; and that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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